
STATE OF MINNESOTA
IN SUPREME COURT
DOCKET NO. C5-83-171

STATE OF MINNESOTA,

PLAINTIFF-RESPONDENT,

vs.

MELVIN HANSON and
GORDON HANSON,

DEFENDANTS-APPELLANTS.

APPELLANTS' BRIEF

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LEGAL ISSUES

- (1) Whether the warrantless arrest, search, and seizure violated Appellants' Constitutional rights where the officers had no probable cause for the arrest, failed to give timely Miranda warnings and subjected Appellant Melvin Hanson to severe embarrassment and threats in order to obtain his "consent" to search.

Trial Court ruled in the negative.

- (2) Whether the Appellants' Constitutional rights of equal protection and due process are violated when the State of Minnesota recognizes the legitimate medical use of marijuana in §152.21 yet places the substance in Schedule I and does not provide a system for medical use of marijuana notwithstanding the mandate in §152.21.

Trial Court ruled in the negative.

PROCEDURAL HISTORY

July 24, 1982	Complaint issued in Lake of the Woods County charging Defendant Melvin Hanson with a misdemeanor and Defendant Gordon Hanson with a petty misdemeanor offense involving possession of marijuana
August 4, 1982	Complaint issued in Roseau County charging Defendant Gordon Hanson with felony possession of marijuana
September 16, 1982	Omnibus hearing before the Honorable Peter N. Hemstead, Judge of the County Court for Lake of the Woods County
November 22, 1982	Omnibus Order from Judge Peter N. Hemstead issued
November 30, 1982	Omnibus hearing before the Honorable Warren A. Saetre, Judge of the District Court, Roseau County
December 17, 1982	Omnibus Order, Findings of Fact, Conclusions of Law and Order for Judgment by Judge Warren A. Saetre, Judge of District Court issued
January 24, 1983	Defendant Gordon Hanson is sentenced in Roseau County
January 24, 1983	Notice of Appeal by Defendant Gordon Hanson to the Supreme Court from the District Court
June 15, 1983	Findings of Fact, Conclusions of Law and Order for Judgment by the Honorable Peter N. Hemstead convicting Appellants in Lake of the Woods County
June 15, 1983	Findings of Fact and Order by the Honorable William Kalar, Judge of the Ninth District Court affirming the Lake of the Woods County Order
July 14, 1983	Petition by Defendants Melvin and Gordon Hanson for permission to appeal from the District Court to the Supreme Court with reference to the Lake of the Woods County matter
March 23, 1984	Order from Supreme Court allowing appeal and consolidation

STATEMENT OF THE CASE

Appellants Gordon and Melvin Hanson are brothers. Late in the evening of July 24, 1983, they were on their way home in Melvin Hanson's car. Deputies Paulseth and Block were proceeding west on Highway 11 while on patrol in Lake of the Woods County, Minnesota. The officers came upon the Hansons' westbound vehicle when it was stopped with its headlights on. The Hansons' car was situated partially on the highway and the shoulder, as the shoulder was narrow at that point in the road. (Lake of the Woods Transcript 37, hereafter Lake T.).

The squad car approached the Hansons' vehicle slowly, pulled up behind the vehicle, and the officers observed the driver and passenger facing toward each other. (Lake T. 10). Shortly after the squad car approached the stopped vehicle, the Hansons' car slowly accelerated with the squad car following. As the Hansons' vehicle accelerated to 20 or 30 miles per hour, the officers displayed the lights on the squad car (Lake T. 11) and the vehicle appropriately pulled over, partially on the highway and the shoulder (Lake T. 12). The officers exited their squad car, and Deputy Paulseth approached the driver's side of the vehicle while Deputy Block approached the passenger side of the vehicle. (Lake T. 13).

Upon asking the driver Melvin Hanson for his license, Deputy Paulseth shined his flashlight in the driver's eyes and

across the interior of the vehicle. (Lake T. 14). The deputy testified that he did not detect the odor of alcohol and that the driver's speech was coherent. (Lake T. 14). Officer Paulseth also testified that he did not run a check on the driver's license because it appeared to be "all right" (Lake T. 16).

As Deputy Paulseth spoke with the driver, Deputy Block opened the passenger's door, and reached in to retrieve a beer can he observed on the floor of the rear of the vehicle. (Lake T. 38). Deputy Block testified that he also saw an owner's manual lying open in the passenger seat between the Hanson brothers and observed, in the spine thereof, what appeared to be a rolled cigarette. (Lake T. 39). Deputy Paulseth recalled seeing only "cigarette papers which do not differ from ordinary cigarette papers." (Lake T. 18).

The passenger, Gordon Hanson, was ordered from the vehicle following Deputy Block's determination that the beer can was empty. (Lake T. 41). Deputy Block then told the passenger, Gordon Hanson, to step in front of the headlights of his brother's vehicle where he was searched. Deputy Block then observed a bulge in the waist area of Gordon Hanson's pants which he concluded was marijuana and "asked for it." (Lake T. 42 and 43). Gordon Hanson was then placed in the backseat of the squad car by Deputy Block. Block testified that he could not recall if he told Gordon he was arrested or not. (Lake T. 43). The officers knew, however, that possession of one rolled cigarette, even if it were to contain marijuana, does not constitute a

criminal offense under the laws of Minnesota. (Lake T. 24).

The officers did not seek Defendant Melvin Hanson's consent to search the interior of his vehicle. Rather, they stated that they saw a rolled cigarette in plain view. The officers did not obtain a search warrant, but rather sought and received Melvin Hanson's "consent" to search first the trunk of his car and then his home. (Lake T. 25). This "consent" was received after Deputy Block ordered Melvin Hanson to stand in front of his car headlights, open his pants and drop them so that the deputy could look for more marijuana. (Lake T. 48). The deputies also discussed, within Melvin's hearing, the possibility that they would seize his car since it "may have been used to transport marijuana." (Lake T. 49).

Melvin Hanson was then told he was arrested for possession of a small amount of marijuana after Deputy Block found a pill vile in his jacket that contained some marijuana butts or roaches. (Lake T. 46). The officers questioned Melvin Hanson after his arrest but before his Miranda rights were given and asked Melvin to show them his homegrown marijuana. (Lake T. 45). Melvin Hanson did not receive Miranda warnings until after he had produced the marijuana that the officers seized at his home in Roseau County. (Lake T. 30, 47 and Roseau Transcript 19, hereafter Roseau T.).

Before taking Melvin Hanson to his home, the Lake of the Woods deputies requested "assistance" from the Roseau County Sheriff's office asking Deputies Sollie and Novacek to meet them

in the town of Roosevelt (which lies on the border of Lake of the Woods County and Roseau County). The Lake of the Woods deputies informed the Roseau deputies that they had both Gordon Hanson and Melvin Hanson in their squad car and that they were charged with possession of a small amount of marijuana. (Roseau T. 5).

The Roseau deputies then placed Melvin Hanson in their squad car leaving Gordon Hanson in the squad car and in the custody of the Lake of the Woods County deputies. Both squad cars then drove to Melvin Hanson's home. (Roseau T. 48).

Upon arrival at Appellant Melvin Hanson's home all four deputies searched his home and surrounding area without a warrant. During this entire time, Gordon Hanson was left in the backseat of the Lake of the Woods squad car where he could observe the deputies load marijuana seized from Melvin's home into the Roseau County squad car. (Roseau T. 29). The Lake of the Woods deputies were then called to Baudette and although Gordon Hanson was at his brother's home, the Roseau County deputies advised Appellant Gordon Hanson they were giving him a ride home. Roseau Deputy Novacek testified that at this point Appellant Gordon Hanson was in custodial arrest for a petty misdemeanor. (Roseau T. 21). As Officer Sollie moved Appellant Gordon Hanson from the Lake of the Woods squad car into the Roseau County squad car he told Gordon that "he didn't think it was right that he (Gordon) was letting his brother (Melvin) take the rap for all this marijuana." (Roseau T. 33). Gordon Hanson

had not asked for a ride home, nor did he have a choice in the matter. (Roseau T. 20, 21).

Although the deputies from Roseau claimed they were only giving Gordon Hanson a "ride home" from his brother's house (Roseau T. 20), they read Gordon his Miranda rights. Deputy Novacek testified that this was necessary since he felt there was marijuana at Gordon Hanson's home, and in order to talk to him and use what was said in court, the Appellant needed to be advised of his Miranda rights. (Roseau T. 28). The deputies had also telephoned the county attorney from Melvin Hanson's home at approximately 2:00 a.m. The County Attorney, specifically told the officers not to arrest Gordon, but to advise him of his rights. (Roseau T. 30). Once Gordon Hanson was placed in the Roseau County squad car, Deputy Novacek could not recall whether or not he had told Gordon that he would be going to jail unless he showed them the marijuana at his residence which Melvin Hanson had indicated was located there. (Roseau T. 27). After the five minute ride from Melvin's residence to Gordon's residence, Appellant Gordon Hanson lead the officers to the barn on his farm. (Roseau T. 39). All three went into the barn where the officers seized Gordon's "winter supply of marijuana." (Roseau T. 36). The officers found no scale, baggies, or similar paraphernalia in the barn. (Roseau T. 23).

Deputy Novacek testified that he was aware of letters to the editor of the local paper written by Gordon Hanson that indicated that Gordon was using marijuana for medical purposes.

Deputy Novacek further testified that he was not surprised when Gordon indicated that he was using the marijuana for medical purposes. (Roseau T. 22 and 23).

In light of the complex constitutional issues that are presented in this case, Appellants would request oral argument.

ARGUMENT

I. ALL EVIDENCE OBTAINED WITH THE EXCEPTION OF ONE HAND-ROLLED MARIJUANA CIGARETTE AND ALL STATEMENTS MUST BE SUPPRESSED INSOFAR AS THEY WERE OBTAINED IN VIOLATION OF APPELLANTS' CONSTITUTIONAL RIGHTS.

A. Evidence Obtained Following Appellants' Illegal Arrest Must Be Suppressed.

Warrantless searches are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well delineated exceptions. United States v. Ross, 456 U.S. 798 (1982), the circumstances of the case at bar do not fall under any recognized exceptions.

The deputies justified their arrest, seizure and search in the case at bar on the basis of an observation of what they believed might be a single marijuana cigarette in plain view; notwithstanding that the deputies knew possession of one rolled cigarette did not constitute a criminal offense under the laws of Minnesota. As such, the case at bar is indistinguishable from State v. Martin, 253 N.W.2d 404 (Minn. 1977), wherein the

Minnesota Supreme Court held that:

Full custodial arrest of defendant for petty misdemeanor offense of possessing a small amount of marijuana was illegal and search of his person was not justified as incident to that arrest. 253 N.W.2d at 404.

In the case at bar, as in Martin, the police did not claim to have probable cause to believe Appellants had drugs on their persons; nor did they state articulable facts in the complaint or testimony to establish probable cause that a crime had been committed at the time they arrested Appellants herein. Thus, the search of Appellants herein cannot be justified as incident to a lawful custodial arrest. United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 216 (1973).

In State v. Ludtke, 306 N.W.2d 111 (Minn. 1981), this Court allowed a limited protective weapons search when a police officer was alone on a highway with two suspects in possession of marijuana, and one of the suspects had made furtive movements. This Court expressly stated, however, that the seizure of the marijuana was not at issue in Ludtke, but the frisk of the suspects and the search of his satchel was proper, given the dangerous situation the officer was confronted with. In the case at bar, Officer Block testified that he greeted Gordon Hanson, recognized him by sight, and that he was not looking for a weapon, but rather suspected that the bulge in Gordon Hanson's pants was marijuana. Thus, the protective search exception recognized in Ludtke clearly does not apply; this case has none of the indicia of danger present in Ludtke.

In State v. Johnson, 277 N.W.2d 346 (Minn. 1979), this Court recognized a motor vehicle exception to the warrant requirement. In Johnson, a deputy went to assist a motorist whose car was stuck in a gravel pit. Through the illumination of the patrol car's headlights, the deputy observed three fresh green plants which he believed to be marijuana, and thus that he was observing criminal conduct. In the case at bar, the facts do not show that the appellants' automobile was being used for a criminal purpose. In addition, the deputies had decided that the car was not going to be driven home that night by either of the appellants in violation of City of St. Paul v. Myles, 218 N.W.2d 697 (Minn. 1974); State v. Goodrich, 256 N.W.2d 506, (Minn. 1977), and thus the car was not accessible to either appellant. Subsequently discovered facts cannot retroactively serve to validate a search which was otherwise unlawful. State v. Curtis, 190 N.W.2d 631 (Minn. 1971). This is analogous to the rule that "A search is not made legal or reasonable by what it turns up, since under established law it is good or bad when it starts." People v. Anonymous A, 290 N.Y.S.2d 334, 337 (1968).

In New York v. Belton, 453 U.S. 454 (1981), the United States Supreme Court established that if there was a lawful custodial arrest of an occupant of an automobile, then the search was permissible as a lawful search incident to the arrest. In this regard, Belton is distinguishable insofar as Martin teaches that there was an illegal arrest in the case at bar, and thus the search cannot be justified as "incident to the arrest of an occupant of an automobile."

The United States Supreme Court has further refined the automobile exception to the Fourth Amendment warrant requirement in United States v. Ross, 456 U.S. 798 (1982). Ross held that an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband. In the case at bar, however, there was no probable cause to believe the vehicle was transporting contraband because of the single hand-rolled cigarette that did not differ in appearance from lawful cigarettes and which, if marijuana, did not constitute a criminal offense.

B. Evidence That Resulted From An Involuntary Consent Is Fruit Of The Poisonous Tree And Must Be Suppressed.

In Judge Saetre's findings of facts and conclusions of law from the Omnibus hearing held in Roseau County, the Judge found that Appellants voluntarily consented to the search of their homes. The proof of consent by one who is in police custody necessitates a heavy burden on the prosecution. U.S. v. Hall, 565 F.2d 912 (5th Cir. 1978). In a case which is close on the question of consent the presence of a single coercive element may be enough to tip the scales. (See, 2 W. LaFave, Search & Seizure 8.2(b) (1978) Appellant Melvin Hanson was directed to stand on Highway 11 at night in front of his vehicle's headlights with his pants down to the middle of his thighs while both

officers "conversed" next to him with regard to their intent to confiscate his car. Without giving Miranda warning, the officers then asked Melvin to show them his homegrown marijuana, and he "consented." Under these conditions his acquiescence to the officer cannot be considered a constitutional consent.

Consent must be more than the product of mere submission to legal authority. U.S. v. Mitchell, 322 U.S. 65 (1944), State v. High, 176 N.W.2d 637 (Minn. 1970).

Coercion exists when consent is sought from a person who has witnessed the apprehension of a friend or relative. Lowery v. State, 499 S.W.2d 160 (Tex. Crim. 1973). Gordon Hanson was in custody in the squad car when he witnessed his brother's humiliation. Gordon remained in the back seat nearly two hours while the four deputies searched and seized the marijuana at his brother's home. Additional coercive factors were present when Officer Sollie transferred Gordon from the Lake of the Woods squad car to the Roseau County squad car and told Gordon "it was a shame that he, Gordon, was letting Melvin take the rap for the marijuana."

The United States Supreme Court suppressed the evidence extracted from an in-custody defendant when a police officer commented that 'it was a shame that the parents couldn't give their daughter a christian burial' because the police officer's conversation was calculated to induce a confession from the defendant. Brewer v. Williams, 430 U.S. 389 (1977). The comments of the officers in the case at bar were calculated to

induce a confession from Appellant Gordon Hanson. Further, the subsequent reading of Miranda warning to Gordon Hanson does not attenuate the taint of illegality. See, Brown v. Illinois, 422 U.S. 590 (1975).

C. Appellants' Were Arrested Once Their Freedom To Move Was Impaired And They Were Placed In The Lake Of The Woods Squad Car But Were Given No Miranda Warnings Before Interrogation.

A police encounter constitutes a seizure sufficient to trigger Fourth Amendment protection only if, in view of all the circumstances surrounding the incident, a reasonable person, innocent of any crime, would have believed he was not free to leave. United States v. Pajari, 715 F.2d 1378 (8th Cir. 1983).

In United States v. Mendenhall, 446 U.S. 545 (1980). Justice Stewart gave the following examples of kinds of circumstances that would indicate a demonstration of force or authority sufficient to constitute a seizure:

The threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person or the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. 446 U.S. 554.

In the case at bar, all the elements set forth in Mendenhall except the display of a weapon by an officer were testified to by the deputies and appellants.

Appellants Gordon and Melvin Hanson were in a custodial situation once they were placed in the Lake of the Woods squad

car, yet they were not advised of their Miranda rights. This court has determined that "mere questioning" on the scene of investigation is specifically exempted from the Miranda warning. State v. Harris, 298 N.W.2d 356 (Minn. 1980). The case at bar is distinguishable from Harris in that the officers went beyond the mere investigation of alleged erratic driving. Thus, the statements and physical evidence obtained must be suppressed. Dunaway v. New York, 422 U.S. 200 (1979); Wong Sun v. United States, 371 U.S. 471 (1963).

II. THE CLASSIFICATION OF MARIJUANA IN SCHEDULE I OF THE CONTROLLED SUBSTANCE ACT; WHEN MEDICAL USE IS APPROVED BUT THE STATE HAS NOT MADE MARIJUANA AVAILABLE FOR MEDICAL USE, DENIES APPELLANT EQUAL PROTECTION AND DUE PROCESS GUARANTEED IN THE UNITED STATES CONSTITUTION.

A. Applicable Constitutional Standard To Be Applied In This Case.

The Fifth Amendment states, inter alia that: "No person shall be . . . deprived of . . . liberty . . . without the due process of law" The plain language of this portion of the Amendment establishes explicit substantive protection for due process rights. While not containing the actual phrase "equal protection of the law," it is . . . also now established that the basic concepts of equal protection apply to the Federal Government through the due process clause of the Fifth Amendment." Johnson v. Robinson, 415 U.S. 361 (1974); Richardson v. Belcher, 404 U.S. 78 (1971).

The Supreme Court has utilized at least two standards of review in accessing equal protection challenges to legislative provisions. Where challenge statutory scheme has involved infringement of a constitutional guarantee or a "fundamental interest," or discrimination based upon a "suspect classification" the court has applied "strict scrutiny" and has upheld the statutory scheme only when it has been shown necessary to promote a "compelling government interest." San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Graham v. Richardson, 403 U.S. 365 (1971). In almost all other circumstances, the Court has applied the "rational relationship test."

Under traditional equal protection analysis a legislative classification must be sustained if a classification itself is rationally related to a legitimate government interest. United States Department of Agriculture v. Monero, 413 U.S. 528 (1973).

For the purpose of this Appeal, the appellants concede arguendo that the proper standard for constitutional review of Appellants' Fifth Amendment claims to due process and equal protection of the law is the "rational relationship test."

An act of the legislature carries a presumption of validity and will be upheld unless it is demonstrated to be irrational. South Carolina Highway Department v. Barnwell Bros., 303 U.S. 177 (1938). Nevertheless, that a legislative declaration of the facts appears to be reasonable when enacted does not insulate the statute from judicial review. See,

Charlseton Corp. v. Sinclair, 264 U.S. 453 (1921); U.S. v. Carolene Products Co., 304 U.S. 144 (1938).

As the Court stated in Truax v. Corrigan, 257 U.S. 12 (1921):

Classification is the most inveterate of our reasoning processes. We can scarcely think or speak consciously or unconsciously exercising it. It must therefore obtain in and determine legislation . . . [B]ut it must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose at hand. (Emphasis added).

The Court has recognized that regulations under the police power, although valid or presumed valid when made, may become arbitrary and irrational in the light of later events. Charlseton Corp. v. Sinclair, *supra*. Moreover, a Court is ." . . not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared." *Id.* at page 547. Thus, as the Court stated in United States v. Carolene Products Co., *supra* at 153-154:

We recognize that the constitutionality of a statute, valid on its face may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support and reason because the article, although within the prohibited class, is so different from others of the class as to be without reason for the prohibition.

There is ample precedent for the appellant to demonstrate through expert testimony and empirical evidence that the statute as applied to marijuana is without support and reason. The article, (marijuana), although within the prohibited

class, is so different from others of the class as to be without the reason for the prohibition. In Brown v. Board of Education, 347 U.S. 483 (1954), the Court granted relief based upon extensive and empirical data regarding psychological effects on black children of segregated education. The Court stated:

The effect of the separation on their educational opportunities was well stated by the finding (in the lower court) in the Kansas case . . . ; Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority (citing numerous scientific studies). 347 U.S. at 494. (emphasis added.)

Arbitrariness and irrationality may not be evident from the literal words of a statute, yet such arbitrariness and irrationality may be "demonstrated" by scientific or other empirical evidence. The Supreme Court reaffirmed this principle in Leary v. United States, 395 U.S. 6 (1969). There the Court was presented with a challenge to 21 U.S.C. § 176a, which provided that persons who possessed marijuana in the United States would be presumed to know that marijuana had been illegally imported. After surveying a massive report, studies, and articles by experts, the court concluded that it could not be said that " . . . at least a majority of marijuana possessors have learned of the foreign origin of their marijuana." Id. at

52. Accordingly, the Court struck down the presumption as invalid, in light of the empirical data. The Court expressly stated:

A statute based upon a legislative declaration of facts is subject to constitutional attack on the grounds that the facts no longer exist; in ruling upon such a challenge, a court must, of course, be free to re-examine the factual declaration. Id. at page 38, note 68.

When such evidence is presented, the Court must seriously consider it in determining the validity of the challenged legislation, and when such evidence is overwhelming, the Court may not rely on a presumption of "reasonableness" to sustain the legislation. The presumption of legislative validity must be rebuttable; yet if overwhelming evidence as to the irrationality of the legislation cannot overcome the presumption, the presumption would become effectively irrebuttable. More importantly the scope of scientific and empirical knowledge is constantly increasing and society's definition of "arbitrary" and "irrational" changes over time. As the United States Supreme Court declared in Harper v. Virginia State Board of Education, 333 U.S. 663 (1966), striking down the poll tax even though it was "and old familiar form of taxation";

The equal protection clause is not shackled to the political theory of a particular error. In determining what lines are constitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restrictive due process to a fixed catalog of what was at a given time deemed to be the limits of fundamental rights Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.

Courts have taken particular pains to assess the true state of facts in cases involving marijuana and other drugs, since the body of medical scientific, psychological, and sociological knowledge has grown rapidly in the past ten years. See, e.g., Leary v. United States, supra; Turner v. United States, 396 U.S. 398 (1970); National Organization for the Reform of Marijuana Law v. The Drug Enforcement Agency, 559 F.2d 735 (D.C. Cir.) 1977.

Finally, it should be noted that a statute may be challenged as irrational and arbitrary either on the grounds of its inclusion or exclusion within a statutory scheme. See, United States v. Carolene Products, supra; and Norey v. Doud, 354 U.S. 457 (1957).

B. The Classification of Marijuana in Schedule I of the CSA is Arbitrary and Irrational.

Marijuana is currently classified as a Schedule I substance in the Controlled Substance Act (CSA), the classification Congress first gave it when the Federal Uniform Law was passed 14 years ago. See, CSA §202(c), 21 U.S.C. §812(c) (1970); Minnesota Chapter 152 (1971).

Congress also set out in the Uniform Act the criteria used to include substances in the Acts five schedules of control. See, CSA §202(b), 21 U.S.C. §812(b). The three criterion required for inclusion in Schedule I are as follows:

1. The drug or other substance has a high potential for abuse.
2. The drug or other substance has no currently acceptable use for treatment in the United States.
3. There is a lack of accepted safety for use of the drug or other substance under medical supervision.

These same criteria are repeated in Minn. Stat. §152.02, Subd. 7 (1971).

As it is apparent from the criteria, Schedule I has been reserved for the most dangerous substances, those substances without medical uses in treatment, such as heroin. Substances listed in Schedule I are generally subject to the strictest controls and harshest penalties, compared to substances listed in the lower schedules of control.

It is important to note that the legislative history of the CSA demonstrates that marijuana's classification Schedule I was intended as a temporary measure based upon limited information. Congress clearly indicated that a reconsideration of marijuana's classification would be appropriate when a number of comprehensive studies, then underway, were completed. The House Report on the CSA, H.R. Rep. No. 91-1444, 91st Cong. 1st Sess. 1970 states:

The Committee requested recommendation on the Department of Health Education and Welfare concerning the appropriate location of marijuana in the schedules of the bill, and by letter of August 14, 1970 (printed in this report under the heading "Agency Report", the assistant secretary for Health and Scientific Affairs recommended "that marijuana be retained as Schedule I at least until the completion of certain studies now under way.

Id. at 456-79.

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The letter from HEW reprinted on page 4629 of the House Report states:

Since there is still a considerable void in our knowledge of the plant and effects of the active drug contained in it, our recommendation is that marijuana be retained in Schedule I at least until the completion of certain studies now under way to resolve this issue.

More than fourteen years later, all of the studies and reports mentioned in this legislative history have now been completed and in addition, there have been a number of other major studies on marijuana conducted in the United States and several foreign countries. Over the past decade, a very extensive amount of research has been done on marijuana, and in the words of one of the most distinguished marijuana researchers, Dr. Norman Zinberg of the Harvard Medical School, "We know as much about marijuana (today) as about any drug." Zinberg, The War Over Marijuana (1980).

It is these recent studies and reports that the court must consider in determining whether marijuana can be classified as Schedule I, rather than the limited information available to Congress and the Minnesota Legislature when the CSA passed, or the exaggerated and distorted claims about marijuana which have often appeared in the media.

1. MARIJUANA HAS NUMEROUS CURRENTLY ACCEPTABLE MEDICAL USES AND TREATMENT.

The second criterion in Schedule I is that "the drug or other substance has no currently accepted medical uses in

treatment in the United States." Minn. Stat. §152.02, Subd. 7. By contrast, substances classified in the other Schedule of the Act (Schedule II through V) are all deemed to have "currently accepted medical uses" or "currently accepted uses with severe restrictions."

It is clear that when the CSA was adopted in 1970 marijuana did not have "currently acceptable uses" in the United States. However, it is equally clear that today marijuana does have a number of currently accepted medical use in this country, particularly in the treatment of glaucoma and patients receiving cancer therapy, which have been recognized by laws passed in 32 states and by recent actions of the federal government authorizing national distribution of marijuana for medical use by the Food and Drug Administration.

It is important to note that the medical use of marijuana is not entirely a new phenomenon. Marijuana has been used as a medicine for thousands of years. Marijuana was prescribed in this country for a wide variety of uses, including its use as a pain reliever, in the treatment of migraine headaches and in the treatment of addictions. At the beginning of the Civil War, marijuana was the most often used anesthetic on the battlefield. Marijuana and Health, Fifth Annual Report to Congress from the Secretary of HEW, 117-119 (1975). Over the past decade, there has been a resurgence in the therapeutic use of marijuana in the United States, particularly for glaucoma and cancer chemotherapy. Millions of Americans suffer from glaucoma,

a serious illness characterized by increasing pressure in the eye, which can result in total blindness. Although there is no known cure for glaucoma, marijuana has been found in a number of studies to be an effective agent in reducing the pressure in the eye and providing relief where other medication have been ineffective. Marijuana and Health, Eighth Annual Report to Congress by the Secretary of HEW, 28-31 (1980); United States v. Randell, 104 Wash. L. Rep. 2249 (D.C. Superior Court 1976) (dismissing marijuana cultivation charges because of medical necessity).

Marijuana has also been proven to be an effective and useful medicine for cancer patients receiving chemotherapy and radiation therapy. Marijuana has been found to be effective in reducing or eliminating the nausea, vomiting, and depression that is experienced by many cancer patients. Eighth Annual Report, supra, at pages 20-29.

Recently, The Institute of Medicine (IOM) of the National Academy of Sciences has conducted a 15-month study of the health related effects of marijuana, at the request of the Secretary of Health and Human Services and the Director of the National Institute of Health. The IOM appointed a 22-member committee to evaluate the health-related effects of cannabis and its derivatives. The report is one of the most comprehensive studies recently conducted on the use of marijuana in controlling diseases. The Committee gave favorable reports on the medical use of marijuana in many therapeutic areas. They reported:

There has been growing interest in the possibility that cannabis and its derivative will be valuable for the treatment of several medical and psychiatric conditions. The 97th Congress, for example, introduced a bill (House Rules 449) "to provide for the therapeutic use of marijuana in situations involving life threatening or sense threatening illness and to provide adequate supplies of marijuana for such use." Most of the therapeutic effects of cannabis are believed to be mediated by the central nervous system. These include effects on appetite, nausea and vomiting, epilepsy, muscle spasticity, anxiety, depression, glaucoma, asthma, and the symptoms of withdrawal from alcohol and narcotics. Institute of Medicine (1982) Marijuana & Health, National Academy Press, Washington, D.C.

The report also noted the excellent potential that exists for using marijuana in combination with other medications.

"What is . . . is more encouraging . . . is that cannabis seems to exert its beneficial effects through mechanisms that differ from those of other available drugs. This raises the possibility that some patients who would not be helped by conventional therapy could be treated effectively with cannabis. A second possibility is that cannabis could be combined with other drugs to achieve a therapeutic goal, but with each drug being at a lower dose than would be required if either were used alone. As a result, fewer side effects would be expected to occur. Id. at 139 (emphasis added).

In one human study involving 15 epileptic patients who previously experienced uncontrolled seizures, the committee reported excellent results with the use of marijuana.

Four of the eight CBD (cannabidiol) subjects remained nearly free of convulsions during CBD treatment and three other patients demonstrated partial improvement in their clinical conditions. Cannabidiol was ineffective in one patient. The placebo group showed no alteration of seizure frequency. This led the group to believe that there is "strong support for further investigation into the utility in human epilepsy." Id. at 146.

Over the past years, 32 states including Minnesota have adopted laws authorizing the use of marijuana for medical purposes. O'Leary, A Matter of Health, Spring (1980) at page 1. These state laws are extremely significant in this case, because they demonstrate that marijuana does have "currently accepted medical uses in the United States."

Agencies of the Federal Government have also taken action to increase access to marijuana for therapeutic purposes. Although marijuana remains classified as a Schedule I substance in the Federal CSA, officials of the Food & Drug Administration and the National Cancer Institute took the extraordinary step in June of 1980 of releasing 500,000 THC capsules to cancer chemotherapy patients around the country. Delta-9-THC is the principle psychoactive ingredient in marijuana. This special program, approved by the the FDA's oncologic advisory on June 26, 1980, required participating physicians to register with both the National Cancer Institute and the Drug Enforcement Agency. O'Leary, supra, page 2. Despite these important actions by Federal Agencies, marijuana and THC are often difficult, if not impossible, for doctors and patients to obtain because marijuana is classified as a Schedule I substance in the Federal CSA.

2. THE MINNESOTA MARIJUANA THERAPEUTIC USE ACT.

The Minnesota Legislature established a "THC Therapeutic Research Act" by amendment to the laws of 1980, Chapter 614 found in Minn. Stat. §152.21. This Act includes the legislative finding that "indicates promise for Delta 9-Tetrahydrocannabinol (THC), the active component of marijuana in alleviating certain side-effects of cancer chemotherapy" The Act provides further in Subd. 4 that the Commissioner of Health, in consultation with the State Board of Pharmacy and State Board of Medical Examiners, must select a person or organization to head up the therapeutic use project in Minnesota. However, the Commissioner of Health has not carried out the legislative mandate.

Subdivision 6 of the Therapeutic Research Act provides that, for the purposes of the Act, THC is removed from Schedule I and inserted in Schedule II. The significance of this "rescheduling" is that physicians may rightfully write prescriptions for substances in Schedule II.

Notwithstanding the Therapeutic Research Act, there is no system in place to provide physicians or pharmacists with marijuana here in Minnesota. The paperwork necessary for a physician to become an authorized prescriber under the Federal Regulations and the "hurdles" involved in accessing marijuana for medical use, has effectively undermined the legislative intent expressed in the Therapeutic Research Act insofar as the primary distribution system for medical use of marijuana still remains "illegal."

Appellant Gordon Hanson has been epileptic since 1956. Doctors have prescribed dilantin and mysoline to control his epilepsy; but these drugs leave Gordon Hanson with no ambition and have caused him serious side effects. In 1976, he experimented with the use of marijuana to control his disease after his prescription medication caused a near fatal overdose to another family member. Appellant Gordon Hanson found marijuana to be the most effective drug to control his epilepsy, and marijuana did not have the serious side effects that the prescription medication caused. Since his success in controlling his disease, appellant has read numerous articles that have confirmed his belief of the usefulness of marijuana in controlling epilepsy, (see, Institute of Medicine, supra). Appellant is left with a Hobson's choice of not treating his disease with the drug that most effectively controls his seizures; or run the risk of becoming a felon by using marijuana.

3. MARIJUANA DOES NOT HAVE A HIGH POTENTIAL FOR ABUSE.

The first criterion for placement of a drug in Schedule I is that "the drug or other substance has a high potential of abuse." Minn. Stat. §152.02, subd. 7. The recent studies on marijuana demonstrate, however, that the reverse is true . . . it has a low potential for abuse.

Perhaps the best example of this is the definitive report issued by the White House Domestic Council Drug Abuse Task

Force, White Paper on Drug Abuse (September 1975). The Task Force, which consisted of federal government chief officials involved with drugs and drug abuse, including HEW and DEA, made a number of significant recommendations. The report urged that marijuana possession offenses be "deemphazied" because they posed the least risk of harm to the individual and to society of the drugs commonly used in the United States. Id at page 33.

The report also contained a chart which compares the potential for abuse of marijuana with other drugs of Schedule I (heroin and hallucinogens) and Schedule II (cocaine, amphetamines, and barbiturates). Id. at page 33. Marijuana had the lowest potential abuse of all the listed drugs.

At the same time that Congress passed the CSA, it also created the National Commission on Marijuana Drug Abuse. See, 21 U.S.C. §801 (note). The National Commission investigated aspects of marijuana use, conducted hearings, both formal and informal, reviewed the existing research which had been done on marijuana in this country and in other countries, and itself commissioned more than 60 research projects in areas where additional information was needed. The Commission's first report, concluded at page 56 and 57:

A large amount of research has been performed in animals regarding the immediate effect of marijuana on bodily process. No conclusive evidence exists of any physical damage, disturbances of bodily processes, or proven human fatalities attributable to even very high doses of marijuana.

The U.S. Department of HEW issued annual reports on the

health consequences of marijuana used over the past eight years as required by Title V of the Marijuana and Health Reporting Act, P.L. 91-296. These annual reports have supported the conclusion of the earlier research commission, and indicated that studies have failed to demonstrate any causal connection between the use of marijuana and loss of motivation, brain damage, effects or chromosome breakdown. See, also Dr. L. Grinspoon, Marijuana Reconsidered Second Edition 1977.

4. MARIJUANA CAN BE SAFELY USED UNDER MEDICAL SUPERVISION.

The third and final criteria for placement in Schedule I is that "there is a lack of accepted safety for use of the drug or other substance under medical supervision." Minn. Stat. §152.02, Subd. 7.

Even if Appellants concede that marijuana satisfied this criterion when the CSA was passed in 1970, today it is obvious that marijuana does not satisfy this criteria. The studies and reports cited in the previous sections in this brief, documents marijuana's low potential for abuse, and indicates that there is no "lack of safety" attendant with the use of marijuana, with or without medical supervision. In addition, the experience of the states that allow the use of marijuana as medicine, documents the safety of the substance. Therapeutic programs in these states demonstrates that marijuana and THC can be safely used under medical supervision. See, O'Leary, supra. (at 1 and 2.)

The classification of marijuana in Schedule I denies Appellant equal protection and due process under the law. The appellant has no choice but to become a felon in order to adequately treat his epilepsy. The present classification of marijuana in Schedule I must be deemed to be arbitrary and irrational when current information proves that marijuana satisfies none of the three criteria for placement for Schedule I, and it's medical use is recognized in Minnesota but the Commissioner of Health has thwarted availability of the drug for medical purposes.

CONCLUSION

Appellants were illegally arrested and placed in a custodial situation for suspicion of committing a petty misdemeanor. The officers failed to give Miranda warnings before engaging the Appellants in incriminating conversation and utilized duress and sympathy to obtain "consent to search." The statements made and the evidence seized with the exception of one marijuana cigarette all flowed from the initial illegal arrest and therefore must be suppressed. Alternatively, Appellant, Gordon Hanson, has been denied equal protection and due process as a result of the arbitrary and irrational classification of marijuana in Schedule I of the Controlled Substances Act and the failure of the Minnesota Commissioner of Health to follow the requirements of M.S.A. §152.21.

Respectfully submitted,

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C5-83-171

STATE OF MINNESOTA

IN SUPREME COURT

STATE OF MINNESOTA,

Respondent,

vs.

MELVIN HANSON AND

GORDON HANSON,

Appellants.

RESPONDENT'S BRIEF

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C5-83-171

STATE OF MINNESOTA

IN SUPREME COURT

STATE OF MINNESOTA,

Respondent,

vs.

MELVIN HANSON AND

GORDON HANSON,

Appellants.

RESPONDENT'S BRIEF

LEGAL ISSUES

1. Was the evidence seized from appellants during the searches of their person and homes obtained in violation of their Fourth Amendment rights?

The trial court ruled: In the negative.

2. Is the classification of marijuana as a Schedule I substance a violation of the Equal Protection Clause of the U.S. Constitution.

The trial court ruled: In the negative.

PROCEDURAL HISTORY

Respondent accepts appellants' statement of procedural history.

STATEMENT OF FACTS

Deputy Sheriffs Paulseth and Block, of Lake of the Woods County, were patrolling Truck Highway 11 during the late night hours of July 24, 1982. At approximately 11:55 p.m. near Graceton, the deputies saw a vehicle stopped in the west-bound lane of traffic (Lake T. 7-9, 37).^{1/} As the deputies slowly approached, their squad car lights illuminated the interior of the stopped vehicle (Lake T. 10). The passenger and driver were facing each other and doing something which the deputies could not discern. There were some other movements made which, again, the deputies could not determine exactly what was being done (Lake T. 10-11).

The passenger subsequently became aware of the deputies' presence and the car began to drive away slowly. Weaving was observed and the car crossed over the center line (Lake T. 11-12). Deputy Paulseth turned on the flashing lights and the vehicle pulled over. Paulseth exited the squad car and approached the driver's side while Block approached the passenger's side (Lake

^{1/} "Lake T." refers to the transcript of the omnibus hearing held before Judge Hemstad in Lake of the Woods County.

T. 11-12). The driver was queried about his erratic driving and requested to provide identification. Either the driver or the passenger said they had stopped earlier because a car was in the ditch, however, Paulseth never saw a car in the ditch (Lake T. 12-13).

Paulseth shined his flashlight in the face of the driver (Melvin Hanson) to check for signs of intoxication. Melvin seemed nervous and "somewhat confused" but Paulseth did not smell any alcohol (Lake T. 14). At this time Block observed a beer can near the feet of the passenger and what appeared to be a marijuana cigarette on the front seat between the driver and the passenger (Gordon Hanson) (Lake T. 16-17, 37-38). The cigarette was laying in an open book which lead Block to believe that "joints" were being rolled inside the book (Lake T. 28).

Block ordered Gordon out of the car then reached in and seized the beer can and cigarette (Lake T. 40-42). Both deputies smelled the cigarette and based upon their experience, concluded it was marijuana (Lake T. 17-20). Gordon was asked to step in front of the headlights of the car. Believing Gordon may have secreted more controlled substances on his person, Block asked him to lift the front of his shirt up. A bulge was observed by Block in the beltline of Gordon's pants. Gordon was then asked to unsnap his pants and hand over whatever the bulge was.

Block believed the bulge to be marijuana. Gordon handed to Block a baggy containing a green vegetable material (Lake T. 42-43). Gordon was placed in the squad car, however, it is not clear whether he was arrested (Lake T. 43).

Deputy Paulseth saw what transpired with Gordon. He ordered Melvin to step to the front of the car, then he searched the car and found a container with what appeared to be marijuana, under the driver's side of the front seat (Lake T. 23). The same material was found scattered on the floor in the rear of the car (Lake T. 23). The glove compartment was also searched and another marijuana cigarette was found (Lake T. 24-25).

During the time when Paulseth was searching the car, Block spoke to Melvin. He noticed something in Melvin's pocket and he asked him to unzip the pocket. Block retrieved from the pocket a pill bottle containing what he believed to be marijuana cigarette butts (Lake T. 45-46). At this point Melvin was arrested (Lake T. 44-45). Melvin subsequently consented to the search of the trunk of the car where the deputies found more leafy material which appeared to be marijuana (Lake T. 25).

Block also conducted a search of Melvin similar to that performed on Gordon. He believed that since Gordon had hidden marijuana in his pants, Melvin might be doing the same. Melvin was therefore asked to lower his

pants to mid-thigh, however, no marijuana was found (Lake T. 47-48).

After the searches were completed and Melvin was arrested, the deputies asked Melvin if he had "homegrown" and if he would show it to them (Lake T. 28). Paulseth believed there might be marijuana at Melvin's home, since he found marijuana in the trunk of the car (Lake T. 48). Melvin agreed to allow the deputies to search his home.

Paulseth had also told Melvin that he believed Melvin was under the influence of a controlled substance and would therefore not be allowed to drive home. Instead, the deputies would be driving him home (Lake T. 27). The deputies then radioed to the Roseau County Deputies and asked them to meet Paulseth and Block at Roosevelt.

Block and Paulseth left the scene in their squad car with Gordon and Melvin. On the way to Roosevelt, Paulseth spoke with Gordon. The conversation centered on Gordon offering explanations of the medical uses of marijuana (Lake T. 29-30). Block and Paulseth subsequently met the Roseau County Deputies (Sollie and Novacek). Melvin was placed in the Roseau County squad car and driven to his home (Roseau T. 6).^{2/} Sometime after arriving at his home, Melvin was read his Miranda

^{2/} "Roseau T." refers to the transcript of the omnibus hearing held before Judge Saetre.

rights (Lake T. 47). Melvin proceeded to show the Roseau deputies several areas where he was growing and drying marijuana plants. Melvin was asked if he would allow a search of his house. Consent was again granted (Roseau T. 32-33). When the search was completed Melvin was told the county attorney would make a charging decision later (Roseau T. 7).

Gordon was transferred to the Roseau deputies' car after the search of Melvin's home (Roseau T. 33). During this transfer process, Deputy Sollie commented that "it was not right that he (Gordon) was letting his brother take the rap for all of the marijuana." (Roseau T. 33). Gordon did not make any response to this statement. Gordon was also told, shortly after being placed in the squad car, that he was going to be taken home. However, had Gordon refused the ride, the deputies would have let him leave immediately (Roseau T. 25-6). In addition, the officers advised Gordon of his Miranda rights immediately after he entered the deputies' squad car (Roseau T. 8-9, 27-28). Prior to this time the deputies had not asked Gordon any questions (Roseau T. 8, 28, 34-35).

After being advised of his rights, Gordon disclosed that he had marijuana and would be willing to show it to the deputies (Roseau T. 9). When the deputies arrived at Gordon's home, he showed the deputies the marijuana he possessed (Roseau T. 10-13). As with Melvin,

Gordon was not arrested, but was told the county attorney would make a charging decision (Roseau T. 13).

Later that same morning Gordon came to the law enforcement center. He had not been asked to do so by the deputies (Roseau T. 14). Once there, Gordon stated that all the marijuana found at his and Melvin's home was his and he alone wished to assume responsibility (Roseau T. 14-15).

Appellants also challenged the constitutionality of classifying marijuana as a Schedule I substance. The challenge was based upon the Equal Protection Clause, however no testimony was presented to the court on this issue.

Based upon these facts the courts ruled the searches were lawful and the evidence was admissible.

ARGUMENT

I. ALL THE EVIDENCE OBTAINED FROM AND STATEMENTS MADE BY APPELLANTS SHOULD NOT BE SUPPRESSED AS THEY WERE ACQUIRED IN A CONSTITUTIONALLY PERMISSIBLE MANNER.

A. The Officers Were Justified In Stopping The Vehicle And The Subsequent Search Of Melvin And Gordon Hanson Was Proper On The Basis Of Probable Cause And Exigent Circumstances.

In their first issue, appellants do not challenge the initial investigatory stop of their vehicle. They do, however, believe the subsequent searches were violative of their Fourth Amendment rights. Even though the initial stop is not being challenged it is necessary to briefly review the facts supporting the stop in order to fully understand the basis for the subsequent search of appellants and the vehicle they were occupying.

The testimony offered by Deputies Paulseth and Block established that they observed a vehicle (later determined to be Melvin Hanson's) parked in the west-bound traffic lane of Truck Highway 11 at approximately 11:55 p.m. on July 24, 1982 (Lake T. 7-8). The car was partially on the shoulder of the road and also in the traffic lane (Lake T. 37). The driver and the passenger were facing each other and doing something (Lake T. 10-11). As the squad car approached, the vehicle pulled away slowly, and began to weave in the traffic lane and crossed the center line (Lake T. 12).

Appellants do not challenge the stop, nor would they be correct in doing so. The Deputies were justified in making an investigatory stop based upon the specific and articulable facts known to them. State v. Duesterhoeft, 311 N.W.2d 866 (Minn. 1981).

At the very least, the weaving of the vehicle clearly suggested the driver was intoxicated. In order to fully understand the subsequent searches it is again necessary to examine not only the facts initially observed by the deputies, but the subsequent facts discovered after the stop as well.

Deputy Paulseth approached Melvin (the driver) and noticed he was nervous and his speech was confused (Lake T. 14). Melvin explained that he stopped along the side of the road because he thought a car was in the ditch. Paulseth, however, saw cars in the area but there was no car in a ditch (Lake T. 12-13). A beer can was also discovered in the car and Melvin stated that it was an old one (Lake T. 14-16). Paulseth believed that based upon the observations he made Melvin was under the influence of alcohol or a controlled substance, but he could not smell any alcohol (Lake T. 16-17).

Deputy Block during this initial encounter had approached the passenger side of the vehicle where Gordon was sitting. From this position he saw an open beer can and what appeared to be a "marijuana joint" on the front seat laying inside an open book (Lake T. 38). Block ordered Gordon out of the car and retrieved the beer can and marijuana cigarette (Lake T. 40-42). Deputy Paulseth also saw the cigarette and cigarette papers. Both he and Block smelled the cigarette and concluded it was marijuana (Lake T. 17).

Here again, appellants do not challenge the seizure of the single marijuana cigarette, and even if they did the seizure was still proper. State v. Vohnoutka, 292 N.W.2d 756, 757 (Minn. 1980).

What the appellants do challenge is the subsequent search of their person and the vehicle. However, the Minnesota Supreme Court has recognized that a warrantless search is justified where officers are faced with probable cause and exigent circumstances. State v. Mollberg, 310 Minn. 376, 383-4, 246 N.W.2d 463, 469 (Minn. 1976).

Appellants argue the deputies never asserted they believed they had probable cause to search them for drugs. But, the search can be upheld regardless of what the deputies' reason for the search was, if the facts disclose a valid grounds for the search. State v. Pleas, 329 N.W.2d 329, 332 (Minn. 1983). Block observed the two men facing each other and doing something. He also knew the car had been parked along the side of the road in an irregular way. In addition, he saw the car weaving as it pulled away. The final significant observation was the marijuana cigarette and beer can on the floor near Gordon's feet (Lake T. 38). The court below found these facts were sufficient to create probable cause to search Gordon for a controlled substance. That ruling was correct.

Melvin's erratic driving and confused speech indicated that he might have been under the influence of alcohol or a controlled substance. Moreover, the reason offered by Melvin for stopping (chekcing on a car in the ditch) was not credible since the officers were in the same area and did not see a car in the ditch (Lake T. 12-13). Even though Gordon was not driving, the presence of the beer can near his feet and the marijuana located next to him unequivocally indicated he had access to a controlled substance. Equally as important, is that the officers saw Melvin and Gordon

facing each other and doing something. Given the presence of the marijuana and the beer can, the activity observed could have been smoking a marijuana cigarette or consuming beer.

Moreover, Paulseth testified that Melvin did not drive away until after the passenger (Gordon) became aware of the deputies' presence (Lake T. 11). Gordon, therefore, knew the officers were behind them. Given this knowledge and the observation of marijuana near Gordon, it was reasonable for Block to assume that Gordon may have hidden marijuana on his person after he spotted the squad car. This conclusion is supported by the observation of additional movements made by Gordon and Melvin while they were parked (Lake T. 11). Though Paulseth could not clearly identify what the two men were doing, he did say the passenger spotted the squad car. The deputies had no way of knowing exactly when they were first identified. They only knew that Gordon (the passenger) at some point became aware of their presence. Had Gordon become aware of their presence before he made some overt gesture to indicate his awareness, quite possibly all of the movements observed by the deputies were made in an attempt to secrete marijuana on their person or in the car. It is quite possible that the squad car was in fact observed earlier than when Gordon indicated he knew the deputies were there, since Paulseth said they approached the car slowly for about 30 seconds (Lake T. 10).

Given the totality of the circumstances Block had probable cause to believe Gordon may have been concealing a controlled substance. See Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317,

2328 (1983) (probable cause must be assessed in light of the totality of the circumstances). Since Block had probable cause to search the only remaining question is whether exigent circumstances existed to justify an immediate warrantless search. The court, quite correctly, noted that exigent circumstances existed. The court pointed to the time of the search (midnight) and that there was no judge readily available. In addition, the substances searched for (marijuana) could have easily been disposed of by Gordon or Melvin while the officers sought to obtain a warrant.

All of these factors have been recognized as sufficient to support a finding of exigent circumstances when an immediate search for a controlled substance is necessary. Mollberg, 310 Minn. at 384, 246 N.W.2d at 469. See United States v. Kulsar, 586 F.2d 1283, 1287 (8th Cir. 1978). The court below was in the best position to determine the difficulties the deputies would encounter in seeking to obtain a warrant in that district at a given hour. People v. Clark, 547 P.2d 267, 271 (Colo. App. 1976). The factual determination on this issue should not be disturbed unless it was clearly erroneous. See State v. Gilbert, 262 N.W.2d 334, 340 (1977). The appellants did not offer, nor does the record disclose, any evidence contrary to the lower court's finding that obtaining a warrant would have been very difficult and would have afforded appellants ample opportunity to dispose of the marijuana.

Moreover, the deputies had very little choice. It is doubtful they could have detained appellants for at least an hour while they attempted to obtain a warrant. A significant limitation

on appellants' freedom of movement could only be accomplished through an arrest. See State v. Lohnes, 344 N.W.2d 605, 610 (Minn. 1984). However, the deputies did not have probable cause to arrest. The deputies then had to make an immediate choice between presenting the facts to a magistrate, which would have rendered the entire issue academic since the marijuana probably would have disappeared; or acting immediately upon the observations and reasonable conclusions drawn from those observations. The deputies were not required to make this kind of choice.

The Minnesota Supreme Court recently affirmed its position that exigent circumstances may justify immediate action. See Lohnes, supra, 344 N.W.2d at 611. The totality of the circumstances should be examined and no single factor must necessarily be present before a search will be upheld. Lohnes, supra, 344 N.W.2d at 611. The record discloses and the trial court found that several factors were present which dictated immediate action. Chief among them, was the need for immediate action to preserve evidence that certainly would have been destroyed had the deputies sought a warrant. Mollberg, supra, 310 Minn. at 384, 246 N.W.2d at 469.

The same reasoning applies with equal force to the search of Melvin. Deputy Block searched Melvin after he found marijuana on Gordon and after Paulseth found marijuana under the front seat where Melvin was sitting (Lake T. 22-23). Initially it should be pointed out that Paulseth's search of the car had a justification independent of the search of appellants. Once the marijuana cigarette was observed the deputies had probable cause and exigent

circumstances which justified a search of the entire vehicle for controlled substances. State v. Vohnoutkon, 292 N.W.2d 757. The search could also encompass, as it did, the trunk and glove compartment of the car (Lake T. 24-25). United States v. Ross, ____ U.S. ____, 102 S.Ct. 2157, 2171-2173 (1982).

When Melvin was searched the deputies had already discovered marijuana secreted on Gordon's person and marijuana hidden underneath the seat where Melvin was sitting (Lake T. 23-24). Melvin was also the driver of the car, so it was he who exhibited the signs of being under the influence of a controlled substance, (i.e., weaving on the road, confused speech). Certainly, at this point there was probable cause to search Melvin for a controlled substance. The deputies had observed marijuana throughout the car and Melvin exhibited behavior which indicated he had been using marijuana. Moreover, Block actually saw that Melvin had something in his pocket (Lake T. 45). It was reasonable for the deputies to believe that Melvin, like his brother, might also have been hiding marijuana on his person.

The deputies actions then were lawful. The initial stop and observation of the marijuana cigarette, when viewed in context, supported Block's conclusion that Gordon was in possession of a controlled substance. Once the marijuana was found this provided additional support for believing that Melvin was also in possession of marijuana. The search of the vehicle though had an independant justification. A controlled substance was observed in plain view. This alone would have justified an immediate search of the entire vehicle. Ross, 102 S.Ct. at 2171-2173.

Appellants believe that their case raises the issue of the legality if their arrest, however, this is patently incorrect. As stated above, the conduct of the officers was justified by probable cause and exigent circumstances. It is also argued that there was no basis for believing the vehicle was being used to transport controlled substances. This obviously ignores the fact that the deputies saw a marijuana cigarette in the car. More important, this argument represents precisely the kind of approach which should not be taken in assessing whether probable cause exists. The question is, at a common sense and practical level what did the deputies know or could conclude from the information they possessed. Gates, 103 S.Ct. at 2328.

Melvin appeared to be under the influence of a controlled substance and the deputies observed a marijuana cigarette. Obviously, if Melvin had smoked marijuana, it must have been from a source other than the cigarette observed. Common sense would suggest that there must have been a source of marijuana other than what the officers observed (i.e. the single marijuana cigarette). Thus, contrary to appellants' position, the deputies had probable cause to believe marijuana, other than that which they observed, was present either in the car or on the person of Gordon and Melvin.

Moreover, the Minnesota Supreme Court has held that the observation of marijuana in plain view creates probable cause to search the vehicle for more controlled substances. Vohnoutka, 292 N.W.2d at 757. The question is not whether they had probable cause to believe the car was used to transport marijuana; rather it is

whether probable cause existed to believe more marijuana may have been in the car Vohnoutka, 292 N.W.2d at 757.

B. Appellants Voluntarily Consented To
The Search Of Their Homes.

Appellants argue that their consent was coerced, but a careful reading of the record does not support their contention. A warrantless search may be conducted if there is consent. This determination is made by examining the totality of the circumstances to ascertain if the consent was freely given or the result of police coercion. State v. O'Neill, 299 Minn. 60, 69, 216 N.W.2d 822, 828 (1974). In the instant case both Melvin and Gordon voluntarily consented to the search of their homes and were not coerced in any way to give their consent.

As argued above, Gordon was searched first then the car was searched for marijuana. Both searches uncovered marijuana. After Gordon was placed in the squad car, Deputy Block returned to search Melvin. As noted earlier, Block had probable cause to search Melvin at this point. Appellants' position now is that since Melvin consented to the search of his home during the course of the search of his person, the consent was involuntary.

The testimony of Block, however, does not disclose any facts about the search itself that indicate coercion. Block stated that he asked Melvin to lower his pants to about the middle of his thigh (Lake T. 47-48). The reason for this request was patently clear and eminently reasonable. Block had already found Gordon hiding marijuana in his pants. Since Block had probable cause to

search Melvin it was reasonable to immediately search the very area where he had found drugs on Gordon (Lake T. 48).

The circumstances surrounding Melvin's consent must be distinguished from those that exist when consent is given during incarceration. See State v. High, 287 Minn. 24, 27-8, 176 N.W.2d 637, 639 (1970). Melvin and Gordon were arrested but were never taken into custody and incarcerated. Neither one was isolated or subjected to the kind of intimidation or coercion that may flow from the fact of incarceration. High, 287 Minn. at 27, 176 N.W.2d at 639.

In fact, Paulseth testified that he told Melvin he could not drive home because he was under the influence. Paulseth went on to tell Melvin the deputies would be giving him a ride home (Lake T. 27). Melvin was therefore not incarcerated and also told that he would be taken home, not to jail. Admittedly, the record is not clear as to when this statement was made; that is before, after, or during the search of Melvin that lead to his arrest. The significant point though, is that Melvin was in fact driven home and not incarcerated. Thus, it is clear the deputies believed and told Melvin he would not be incarcerated and acted accordingly. There is nothing in the record that suggests Melvin believed anything other than what he was told by Paulseth, i.e. he was going home. There is no evidence indicating that the deputies' conduct was inconsistent with Paulseth's statement. Neither Melvin nor Gordon were handcuffed, they were simply placed in the squad car.

Appellants also note that Melvin gave his consent prior to being given Miranda warnings. Block stated that Miranda warnings were given after they arrived at Melvin's home (Lake T. 47). He also indicated that he discussed the presence of marijuana in Melvin's home after Melvin's arrest (Lake T. 28, 47-8). Assuming arguendo the warnings were given after Melvin consented to the search of his home, this fact alone does not show the consent was involuntary. See Hubbard v. Jeffes, 653 F.2d 99, 103-2 (3rd Cir. 1981); United States v. Lemon, 550 F.2d 467, 471-73 (9th Cir. 1977); United States v. Garcia, 496 F.2d 670, 673-75 (5th Cir. 1974). Whether or not Miranda warnings are given, is simply another factor added to the totality of circumstances which should be considered. Garcia, 496 F.2d 674-75.

If Melvin was read his rights after he consented, this still is not a case where the search was actually conducted before Melvin was appraised of his rights. Melvin was read his rights at his home (Lake T. 47). He did not withdraw his consent or request the assistance of counsel. Since he was ultimately made aware of his rights but did not exercise them by seeking the aid of counsel, this is further evidence that the consent was voluntary. United States v. Mathews, 603 F.2d 48, 52 (8th Cir. 1979).

Gordon's position on the issue of voluntariness is even less convincing than Melvin's. Gordon was never interrogated by the deputies after he was placed in the squad car. Paulseth testified that when they arrived to search Melvin's home, he and Melvin carried on a conversation of a general nature. The course of the

discussion centered on Gordon's views about the medical reasons for smoking marijuana (Lake T. 29). Gordon was not read his rights, but he was not questioned. Gordon simply chose to talk about the medicinal uses of marijuana (Lake T. 30).

After Melvin's home was searched, Gordon was placed in the car of the Roseau County deputies. He was promptly read his rights but was not questioned (Roseau T. 7-8). Gordon said he understood his rights and admitted he had marijuana in his home and was willing to show it to the deputies (Roseau T. 9).

As with Melvin, Gordon was not told by the deputies that he was going to be taken to jail. Instead, he was told he would be taken home (Roseau T. 25-26). This statement by the deputies should have been convincing since Gordon had already seen that his brother, as promised, was not taken to jail but was driven home. There simply is no evidence of any coercive conduct by the deputies. Gordon did not consent until after he was read and acknowledged his understanding of his rights (Roseau T. 8-9, 21). This is persuasive evidence that the consent was voluntary. Mathews, 603 F.2d at 52.

Two factors are pointed to as evidence that Gordon's consent was involuntary. He witnessed the search of his brother's home and Deputy Sollie offered the opinion that he did not think it right that Gordon was allowing Melvin to take the blame (Roseau T. 39). Initially it is argued that Gordon sat in the car for two hours. This assertion, however, is inconsistent with the findings of fact. Melvin's car was originally stopped at 11:55 p.m. while Gordon was read his rights at approximately 12:30 a.m. the next

morning (Roseau Finding of Fact p. 1; Roseau T. 40). This clearly is not a two hour period of time. Appellants also cite Lowery v. State, 499 S.W.2d 160 (Tex. Crim. 1973) as supporting their position that coercion exists when one relative watches another relative apprehended. Actually, the court in Lowery found coercion exists where consent is given after five or more officers, with weapons drawn, enter a home to make an arrest and then seek consent to search from one of the occupants of the home. Lowery, 499 S.W.2d at 167.

Appellants' position simply is not supported by the record. Deputy Sollie admitted to making the comment, but Gordon did not immediately respond. Gordon did not say anything until after he was read his rights. Moreover, no explanation is offered as to how this comment would induce consent. Melvin's house had already been searched and the evidence was found. By allowing the officers to search his home, Gordon would not be lessening Melvin's criminal liability.

Appellants also cite Brewer v. Williams, 430 U.S. 389 (1977) in support of their argument that the deputy's comment was calculated to induce a confession in violation of Gordon's rights. Brewer has no application here because that case was decided upon the basis of the Sixth Amendment right to counsel. Brewer, 430 U.S. at 394-403. Gordon's Sixth Amendment right to counsel had not attached. See State v. Phelps, 328 N.W.2d 136, 138 (Minn. 1983). More important, the statement by Sollie was not custodial interrogation. Gordon was told that he was being taken home (Roseau

T. 25). If he had refused the ride home, Gordon would have been allowed to immediately leave the car (Roseau T. 26). Gordon's freedom to leave was not impeded by the deputies and their statements and conduct did not indicate otherwise. Under these circumstances the statement by Sollie was not custodial interrogation. See State v. Palm, 299 N.W.2d 740, 741 (Minn. 1980). The restraint on Gordon's freedom of movement was prompted by his decision to accept a ride from the deputies. His consent was therefore voluntary and not the result of coercion.

C. Appellants Were Placed In Custody Once
They Were In The Lake Of The Woods
Squad Car But The Physical Evidence
Seized Need Not Be Suppressed.

Judge Hemstad found that Gordon was arrested and placed in custody after Deputy Block discovered marijuana in Gordon's waistband. Melvin was arrested and in custody after Block found marijuana in Melvin's pocket (Lake of the Woods Ruling and Findings of Fact p. 6). Appellants agree with this finding but go on to assert that Miranda warnings were not given in the squad car so all of the evidence subsequently discovered must be suppressed. As argued above, the evidence discovered at the homes of Gordon and Melvin was seized pursuant to a consent search. Assuming, arguendo, that Melvin consented before being read his rights, the consent was still voluntary. Garcia, 496 F.2d at 674-75. Moreover, the actual consent given by both Melvin and Gordon does not implicate their Fifth Amendment rights and may therefore be used to demonstrate their consent. See Lemon, 550 F.2d at 472. Since the consent was voluntary, the evidence seized need not be suppressed.

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Appellants also argue that their statements should be suppressed. The record only discloses a few very limited statements made by appellants after they were placed in the squad car. Gordon only spoke about the medical uses of marijuana, while there is no indication that Melvin was questioned or made any incriminating statements in the squad car. Respondent therefore believes that the record fails to disclose any incriminating statements made by Melvin or Gordon while in the Lake of the Woods squad car. The only significant statements made were the consent given by Melvin and Gordon and as stated earlier this was voluntarily given.

II. THE CLASSIFICATION OF MARIJUANA AS A
SCHEDULE I SUBSTANCE DOES NOT DENY
APPELLANTS EQUAL PROTECTION AND DUE
PROCESS.

In their final argument appellants challenge the constitutionality of classifying marijuana as a Schedule I substance. Specifically, they allege that the classification is arbitrary and irrational and is therefore a violation of the Equal Protection and Due Process Clauses of the United States Constitution. The standard governing review of this issue is well defined. The classification will be upheld if it is reasonable and bears a rational relationship to a permissible state objective. State v. Vail, 274 N.W.2d 127, 134 (Minn. 1979). Furthermore, the burden of proving the classification unconstitutional is upon the person challenging the statute, and that burden can only be met by proof beyond a reasonable doubt. Rio Vista Non-Profit Housing Corporation v. County of Ramsey, 335 N.W.2d 242, 247 (Minn. 1983).

The Minnesota Supreme Court has already held that the continuing classification of marijuana as a Schedule I substance is reasonable and therefore constitutional. Vail, supra, 274 N.W.2d at 135-36. Appellants argument is based upon studies dealing with the medical uses of marijuana. They conclude that since the three statutory grounds for classification found in Minn. Stat. § 152.02, subd. 7 are not met marijuana should not be classified as a controlled substance. In their view, marijuana has a variety of medical uses so it is improper to classify it as a Schedule I substance.

This position actually involves two distinct arguments. The three criteria listed in section 152.02, subd. 7 actually provide the standards to be used by the pharmacy board in determining what additional substances should be classified as a Schedule I substance. Vail, 274 N.W.2d at 134, n.12. The second argument, which is the one appellants are relying upon, is that marijuana should be rescheduled. The provision controlling the rescheduling process is Minn. Stat. § 152.02, subd. 8. Vail, 274 N.W.2d at 134, n.12. Appellants' argument is obviously inconsistent with the statutory scheme and the decision interpreting these provisions. Appellants are arguing for a rescheduling of marijuana but are not using the appropriate criteria.

Actually, by using the three statutory criteria in section 152.02, subd. 7, appellants are impliedly arguing that the legislature erred when it initially classified marijuana as a Schedule I substance. That is, the legislature improperly applied

its own criteria. If this is appellants' position they face a heavy burden. The statutory listing of marijuana as a Schedule I substance carries, by implication, legislative findings that the three criteria delineated were met. State v. Vernon, 283 N.W.2d 516, 518 (Minn. 1979). These findings are accepted in the absence of overwhelming evidence to the contrary. Vernon, 283 N.W.2d at 518. Appellants have not presented this evidence because it simply does not exist. The initial classification has been upheld as reasonable given the uncertainty over the physical and psychological effects of marijuana. National Org. For The Reform of Marijuana Laws v. Bell, 488 F.Supp. 123, 141 (D.C. Dist. Columbia 1980); United States v. Kilfer, 477 F.2d 349, 356 (2nd Cir. 1973); Vail, 274 N.W.2d at 135. Since appellants devote most of their argument to discussing scientific literature published since the enactment of the Controlled Substances Act, respondent will assume their actual argument is that marijuana should be rescheduled rather than that the legislature erred when it initially classified marijuana as a Schedule I substance.

If this is appellants' position, it is equally as untenable as any attack they may have made (or may be making) upon the initial scheduling of marijuana. The question actually raised by appellants, whether they realize it or not, is whether a classification must be continually changed as each new report or study is published which provides additional information for the legislature to consider. For equal protection purposes, the answer is clearly no. Bell, 488 F.Supp. at 136-37. The dispute over the

harmful or benign affects of marijuana continues and the growth of information only serves to fuel the controversy rather than extinguish it. United States v. Fogarty, 692 F.2d 542, 547, 48 (8th Cir. 1982), cert. denied 103 S.Ct. 1434; United States v. Middleton, 690 F.2d 820, 823 (11th Cir. 1982), cert. denied; Vail, 274 N.W.2d 135-36.

Given this controversy, appellants are asking this Court to make a decision which is preeminently a legislative one. The criteria for rescheduling found in section 152.02, subd. 8 are broad in scope and require the blancing of difficult political, social and medical issues. This is clearly a legislative, not a judicial function. Bell, 488 F.Supp. at 137, 141. The controversy over marijuana continues and ultimately must be resolved by the legislature, not the courts.

CONCLUSION

For all the reasons stated above, respondent respectfully request this Court to affirm the conviction and sentence of appellants.

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STATE OF MINNESOTA

IN SUPREME COURT

FILE NO. CS 85 370

OFFICE OF
APPELLATE COURTS
FILED

FEB 20 1985

WAYNE TSCHIMPERLE
CLERK

In Re Petition for Disciplinary
Action against THOMAS M. POLT,
Respondent.

DIRECTOR'S
PETITION FOR
DISCIPLINARY ACTION

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of Lawyers Professional Responsibility,
hereinafter Director, files this petition at the direction of a
Lawyers Professional Responsibility Board Panel.

The Panel heard evidence on counts 1 through 6 and pursuant to
Rule 9(i), Rules on Lawyers Professional Responsibility (RLPR),
made a finding of probable cause. Pursuant to Rules 9, 10(d) and
12, the Director also alleges the professional misconduct set
forth in counts 7 through 9, which need not under the RLPR be
first presented to a panel before inclusion in this petition.

Respondent is, and has been, since May 5, 1978, admitted to
practice law in Minnesota. Respondent has paid through June 30,
1985, the registration fee required by Rule 2, Rules for
Registration of Attorneys. Respondent currently practices law in
Eyota, Minnesota.

Respondent has committed the following unprofessional conduct
warranting public discipline:

FIRST COUNT

Respondent Misappropriated Client Trust Funds

A. Respondent's trust account bank statements for July,
1984, April, 1984, and March, 1983, indicate negative balances
during each of these months.